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Supreme Court, U.S.
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No. 97-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ALAN MCCASKILL ,

Petitioner,

vs.

TOGO WEST, JR., SECRETARY OF THE ARMY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL W. LILLIE
Counsel of Record
LILLIE ASSOCIATES LLC
Attorneys for Petitioner
P.O. Box 4274
Englewood, CO 80155
(303) 694-1100

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(a)Question Presented for Review

Whether a federal employee who is retaliated against under Title VII through a false and defamatory reference to a potential private employer is entitled to back pay in the amount of the difference between his federal pay and the amount he would have received in the private employment.

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Alan McCaskill petitions for a writ of certiorari to review the opinion and judgment of the Court of Appeals for the Tenth Judicial Circuit entered in this case on September 24, 1997.

(d)OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Appendix 10(1)(i)(i)) is not reported. The case in the Court of Appeals is *McCaskill v. Togo West, Jr., Secretary of the Army*, No. 97-1032, September 24, 1997.

The judgment of the District Court for the District of Colorado (Appendix 10(1)(i)(ii)) is not reported. The case in the District Court is *McCaskill v. Togo West, Jr., Secretary of the Army*, No. 95-Z-254 (D.Colo.).

JURISDICTION

The opinion of the Court of Appeals for the Tenth Circuit was entered on September 24, 1997. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254 (1994).

(f)STATUTE INVOLVED

> If a court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice

> charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other suitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g).

(g)STATEMENT OF THE CASE

Mr. McCaskill brought this case under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* Mr. McCaskill appealed timely pursuant to 28 U.S.C. § 1291 from the final decision of the district court disposing of all claims. The Tenth Circuit affirmed and Mr. McCaskill timely filed this petition.

This case involves Mr. McCaskill 's right to back pay under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, as the result of his loss of an employment opportunity due to a defamatory reference by defendant, his existing employer. Mr. McCaskill, a black firefighter employed by the Department of the Army at Fitzsimons Army Medical Center in Aurora, Colorado, alleged numerous instances of race and reprisal discrimination commencing in 1988. Mr. McCaskill prosecuted his complaints through the federal administrative

process, which included an evidentiary hearing before an administrative judge of the EEOC, an appeal to the Department of the Army and an appeal to the EEOC itself. At all three levels of administrative determination, the fact-finder concluded that Mr. McCaskill had been subjected to an ongoing pattern of discrimination and harassment on account of his race and filing of EEO charges. The agency itself concluded that "management, by its acts of discrimination and reprisal, so harassed complainant that it created a hostile working environment in which complainant had to work." The EEOC ultimately found an "ongoing pattern of harassment based on [Mr. McCaskill's] race and prior EEO activity that affected his working conditions." Many of the twelve alleged instances of discrimination or retaliation were sustained. The EEOC ordered that the Army cease and desist discrimination and reprisal toward Mr. McCaskill, training of supervisory personnel, monitoring of compliance, and that Mr. McCaskill be given an opportunity to document sick and annual leave lost due to discrimination.

One instance of unlawful reprisal, the subject of this appeal, pertained to Fire Chief Doty's giving a false and defamatory job reference to a private investigations firm to which Mr. McCaskill had applied for employment as an investigator. At the hearing before the EEOC administrative law judge, it was established that in response to a telephone call from the director of the firm, Edward Gibson, Fire Chief Doty stated that Mr. McCaskill was currently under suspension for theft of government property, a statement admittedly without any factual basis. As a result, Mr. McCaskill, who otherwise was a leading candidate for the position because of his background, was given no further consideration and another was hired in his stead. Mr. Gibson testified that McCaskill was definitely a strong candidate for the position because of his firefighter background and would have been hired but for the negative reference from Chief Doty. The job in question would have paid Mr. McCaskill $31,285 annual salary, substantially more than his federal pay at the time. When Mr. McCaskill recontacted the employer about why he was not selected, Gibson cited the derogatory information from Chief Doty. Mr. Gibson then sent a letter to the fire department asking

for clarification regarding any misinformation about McCaskill's work history. The agency failed to respond to the inquiry.

The EEOC Administrative Judge found that Mr. McCaskill indeed had been subject to unlawful reprisal and recommended that he be granted back pay in the amount of the difference between his federal pay and what he would have earned in the investigation job, and that his present salary be set at the level he would have received in the private employment. The AJ concluded that "to deny back pay would frustrate the central statutory purpose of irradicating [sic] unlawful discrimination." The Department of the Army adopted the finding of reprisal, but declined to grant back pay. The EEOC also declined to order back pay, on the ground that such relief was "compensatory in nature." Mr. McCaskill then brought suit in federal district court for the district of Colorado, primarily to seek a review of the remedies ordered by the EEOC.

The issue of back pay as an available remedy was raised in the district court by the parties' cross motions for partial summary judgment. Mr. McCaskill argued that the EEOC erred in denying such relief, which would clearly apply had the loss of a higher paying position been within the federal system. The Army argued that payment of salary lost from a separate employment would be "compensatory" in nature. After hearing argument the district court granted the Army's cross motion, concluding "that Mr. McCaskill cannot be awarded back pay." The trial court's rationale was stated in an oral ruling:

> The cases that plaintiff cited stand for the fact that back pay is generally appropriate in Title VII cases; and indeed, if Mr. McCaskill had been denied a promotion, let's say, that he should have been given with the - - with the defendant, with the government, and that was because of discrimination, then he would have been entitled to the back pay that he would have made had he been given a proper promotion with the government. But back pay in no case that I've ever seen or that has been cited here can apply, because he did not get a job with some other company, not the company that he's suing, not the company that's the

defendant.

> Now, on the other hand, there should be some remedy for a wrong; and if he was wronged, there should be some remedy. The remedy may not be as strong or as financially sufficient as plaintiff would like, but there should be some remedy. And I would ask the attorneys to see if they can get together and come up with a creative solution perhaps by way of a better paying job or a position for Mr. McCaskill within the area where he is. If that is possible, then it should be done.

(Transcript of hearing April 2, 1996, p. 12. See Appendix 10(1)(i)(ii)). No settlement could be reached, and Mr. McCaskill proceeded to trial on the issue of what remaining remedies should be granted. The district court ordered he be granted credit for certain leave taken, and that training and internal monitoring be undertaken as directed by the EEOC.

As is the case here, only the issue of availability of back pay as a remedy was raised on appeal.

(h)REASONS FOR ALLOWING THE WRIT

This Case Presents An Important Federal Statutory Issue – An issue Resolved Incorrectly by the Court of Appeal and an issue decided to the contrary by the other Circuit Courts which have considered it.

A derogatory job reference motivated by race or reprisal is a violation of Title VII. *Robinson v. Shell Oil Co.*, U. S. Sup. Ct. 95-1376, 1997 U.S. Lexis 690 (announced February 18, 1997); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1166 (10th Cir. 1977); *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1142 (D.C.Cir. 1973). The rationale is stated in *Sibley Memorial Hosp.*:

> To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.

488 F.2d at 1141. Such rationale applies even more forcefully to agencies of the United States government, and especially its military branches, from which many rely heavily on a dependable agency reference to move to higher paying positions in the private sector. Once a violation is established, the full range of remedies under the Act are in play.

The provisions of Title VII prior to its amendment in 1991 are the provisions applicable to Mr. McCaskill 's claim. Title VII at such time provided for equitable relief only:

> If a court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other suitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g), Pub.L. 92-261, § 4, March 24, 1972, 86 Stat. 104. Such remedies apply as well to discrimination in federal employment. 42 U.S.C. § 2000e-16 (d).

Section 1981a of the Civil Rights Act of 1991, 42 U.S.C. § 1981a, made provision for the award of non-equitable,

"compensatory" damages to a person like Mr. McCaskill. Such statute explicitly excepted back pay from such "compensatory" damages, 42 U.S.C. § 1981a(b)(2), however, so it remains today the role of the trial court, not the jury, to assess back pay as part of the court's equitable relief. In other words, the issue presented by this petition is the same issue under present law.

In short, "back pay" was and is statutorily recognized as a variant of equitable relief under Title VII. Whether by its restitutionary nature or otherwise, back pay was distinguished by Congress from those types of damages described as "compensatory." *See, e.g., Berry v. Stevinson Chevrolet*, 74 F.3d 980 at 988(10th Cir. 1996)(denying recovery under Title VII for

> compensatory damages for the "extreme emotional distress, suffering, embarrassment, humiliation, loss of reputation, standing in the community . . . he experienced as a proximate result of . . . retaliation." 74 F.3d at 984.)

As the Eleventh Circuit explained it,

> We caution . . . that the compensatory damages ban does not include concomitants of employment such as fringe benefits, pension benefits, or other lost work benefits which at times have been referred to as "damages."

Walker v. Ford Motor Co., 684 F.2d 1355, 1364 (11th Cir. 1982). The *Walker* court added:

> Courts have rarely been precise in defining whether requested relief in title VII cases is for "damages" or an equitable remedy. Black's Law Dictionary defines "compensatory damages" as damages "such as will compensate the injured party for the injury sustained and nothing more." While certain types of equitable monetary relief such as back pay or restoration of other lost work benefits could fit this rather expansive definition, the cases holding that "compensatory damages" are unavailable in Tittle VII actions uniformly deal with either claims for

> emotional distress (or pain and suffering") or else requests for damages resulting from the consequences of an adverse employment action, such as a ruined credit rating.

Id. at 1364-65, n. 16.

In light of the "purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination," this Court has emphasized that back pay is the primary and standard remedy to be applied under the Act. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975). Courts since have held that back pay should be awarded as a matter of course whenever a violation of Title VII is found, absent extraordinary circumstances. See, e.g., *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983), cert. den., 466 U.S. 950, 104 S.Ct. 2151, 80 L.Ed.2d 537 (1984).

Several cases have directly or indirectly addressed the application of the back pay remedy where the employment opportunity lost was not with the employer responsible for the violation. In *Sibley Memorial Hosp. v. Wilson*, the District of Columbia Circuit spoke directly to this issue:

> The statutory enumeration of remedies is by its terms, however, illustrative rather than exhaustive; and it also reaches explicitly beyond the context of direct employment to employment agencies and labor organizations. While neither hiring nor reinstatement may be relevant outside the context of direct employment, both injunctive and back pay relief (in the sense of monetary damages for lost employment opportunities) may be available, in an appropriate case, against respondents who are neither actual nor potential direct employers of particular complainants, but who control access to such employment and who deny such access by reference to invidious discrimination.

488 F.2d at 1342.

Several decisions in several circuits have ordered or affirmed an award of back pay against an employer or union making a discriminatory reference as to an employee's application for outside employment. Indeed, there is no known authority **denying** back pay relief where a second employment opportunity is lost due to a discriminatory reference or other adverse employment action. The Tenth Circuit's decision is apparently the first decision under Title VII upholding a denial of back pay as a matter of law. See cases gathered at Larson, Employment Discrimination, Chapter 92.

In *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir.), *cert. denied*, 498 U.S. 943 (1990), Sherman was a former employee of Burke. Sherman claimed that Burke, in retaliation for Sherman's EEOC claim against Burke, persuaded Palmer, Sherman's subsequent employer, to fire Sherman. The Eleventh Circuit upheld the award of back pay, defined by the court as those "wages Sherman would have earned if he had continued to work for Palmer from the time he was fired until the time of trial." 891 F.2d 1535-36. The *Sherman* court recognized that while section 1981 allowed "punitive as well as compensatory damages..., Title VII limits a plaintiff to 'equitable monetary relief' such as lost wages and work benefits." 891 F.2d at 1535.

The same result took place *in Czarnowski v. Desoto, Inc.*, 518 F.Supp. 1252 (N.D. Ill. 1981). Czarnowski, a former employee of DeSoto, applied to Congoleum for a sales representative position. Desoto disclosed to Congoleum that Czarnowski had filed an EEOC charge against DeSoto, a disclosure which the court found retaliatory and to constitute an adverse employment action. The court awarded to Czarnowski "the difference between actual earnings for the period and those which the plaintiff would have earned absent the discrimination by the defendant." 518 F.Supp. at 1259.

The result was also the same in *Farmer v. Local 1064*, 21 FEP 1599 (E.D.Mich. 1978), *aff'd sub nom Farmer v. ARA Servs.*, 660 F.2d 1096 (6th Cir. 1981). In *Farmer*, employees sought relief against their union for retaliation under Section 704(a) of Title VII, the exact same retaliation section relied upon by Mr. McCaskill. The trial court ordered that the union pay the

employees' "back pay (the difference between the amount actually earned by each of the plaintiffs since July 2, 1965, and the amount each would have earned in the higher paying classification . . ." 21 FEP Cases at 1623. The *Farmer* Court noted that "back pay is an integral part of the statutory equitable remedy, designed to make persons whole for injuries suffered on account of unlawful employment discrimination." *Ibid.* See also *dictum* in *Coltrane v. Ga. Dept. of Offender Rehab.*, 23 FEP 1421, 1437 (N.D.Ga. 1980)(adverse reference leading to failure to secure employment would entitle plaintiff to back pay relief).

Likewise *in Christopher v. Stouder Memorial Hospital*, 936 F.2d 870 (6th Cir. 1991) the Sixth Circuit was reviewing a claim for back pay based upon the plaintiff's claim that a hospital's retaliatory action had prevented her from working for certain doctors. 936 F.2d at 876. While the *Christopher* court upheld the trial court's conclusion that the pay arrangements between the doctors and the plaintiffs were too ambiguous to sustain an award of back pay, the court found back pay to be an eminently available remedy:

> The finding of discrimination . . . and the clear intent of Congress that the grant of authority under Title VII should be broadly read and applied mandate an award of back pay unless exceptional circumstances are present.

936 F.2d at 880.

The Tenth Circuit correctly recognized that considerable discretion is vested in the district court to fashion remedies for a Title VII violation. *Estate of Pitre v. Western Elec. Co.*, 975 F.2d 700, 704 (10th Cir. 1992). Here the district court excluded entirely from consideration the standard remedy of back pay, meaning an award of the pay lost due to discrimination. To do so without hearing evidence of the nature, circumstances and amount of such loss was error. Neither the Army nor the EEOC, of course, could compel the private innocent employer to hire Mr. McCaskill. Nor does it remedy the retaliation to order as they did that Fitzsimons Army Medical Center send a letter to such

employer clearing Mr. McCaskill's name. The opportunity was already lost through the hiring of another individual. While one going forward remedy would be to place Mr. McCaskill in a better paying position as the district court suggested the parties discuss, such a remedy was unavailable because of the imminent closing of Fitzsimons. It would not, at any rate, have made Mr. McCaskill whole for the loss of greater pay in the outside position. Indeed, back pay is the *only* remedy that would do so.

CONCLUSION

The opinion of the Tenth Court of Appeals represents a wholesale rejection of back pay as one of the bulwarks of Title VII. Such opinion sets the Circuits against one another in an area where additional confusion is not needed. The petition for the writ of certiorari should be granted.

Respectfully submitted,

LILLIE ASSOCIATES LLC

By_____

Michael W. Lillie
P.O. Box 4274
Englewood CO 80155
(303)694-1100 Fax(303)694-1188

APPENDIX 10(1)(i)(i)
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
FILED SEPTEMBER 24, 1997

ALAN G. MCCASKILL

Plaintiff-Appellant,

v.

No. 97-1032
(D.C. No. 95-Z-254)
(D. Colo.)

TOGO D. WEST, JR.,
Secretary of the Army,

Defendant-Appellee.

ORDER AND JUDGMENT

Before TACHA, MCKAY, and BALDOCK, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff Alan McCaskill, a civilian employee of the Department of the Army, brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. sections 2000e-1 to -17, against defendant Togo West, Secretary of the Army. Plaintiff alleged various acts of racial discrimination by his employer, the Fitzsimmons Army Medical Center Fire Department, including a claim for discriminatory retaliation for filing complaints with the Equal Employment Opportunity Compliance and Complaints

Review Agency of the Department of the Army (the agency).

Between February 1988 and October 1990, plaintiff filed numerous formal complaints with the agency, alleging racial discrimination and retaliation. Being dissatisfied with the proposed disposition of the agency, plaintiff requested a hearing before an administrative judge (AJ). Following a recommended disposition by the AJ, the agency issued its final decision, finding five acts of discrimination against plaintiff based on race, plus finding that, in retaliation for filing discrimination complaints, the fire chief gave false and derogatory information to a prospective employer that plaintiff was under suspension pending investigation for theft. On five additional claims, the agency found no discrimination on the basis of plaintiff's race. The relief awarded plaintiff in the agency's decision included a letter to the prospective employer, explaining that the information he had been given was false, but did not include an award of back pay.

Plaintiff's appeal to the Equal Employment Opportunity Commission (EEOC) was dismissed initially because plaintiff had filed a civil action in district court. The EEOC granted plaintiff's request for reinstatement of his appeal and consideration of the merits based upon the district court's dismissal of his civil action without prejudice. In addition to the acts of discrimination found by the agency, the EEOC found that plaintiff had established a prima facie case of discrimination on three additional claims. The EEOC's ordered relief also did not include an award of back pay.

Dissatisfied with the EEOC's resolution, plaintiff filed suit in federal district court. In his complaint, plaintiff appealed the EEOC's (1) denial of back pay, (2) failure to specify and define the disciplinary action to be taken against certain Army personnel, (3) failure to specify and define the procedure for crediting plaintiff with sick and annual leave, (4) failure to order an effective training and monitoring procedure for the Fitzsimmons' fire department, (5) failure to place plaintiff in the employment situation he would have enjoyed but for the discrimination, and (6) denial of compensatory damages under the

Civil Rights Act of 1991.

Defendant filed a motion to dismiss, to strike, and for summary judgment. Defendant sought to strike plaintiff's claim for compensatory damages and for a jury trial, and moved for summary judgment on plaintiff's claims for additional remedies. Plaintiff filed a motion for partial summary judgment alleging entitlement to back pay as a matter of law. In a cross-motion for partial summary judgment, defendant averred that plaintiff was not entitled to back pay for a private sector job he never received. Defendant argued that an award of this kind would be compensatory in nature and therefore, unavailable under Title VII.

Following a hearing on the parties' various motions, the district court granted defendant's motion to dismiss and strike, dismissing plaintiff's claims under the Civil Rights Act of 1991, and denying plaintiff's request for back pay. The court also granted defendant's cross motion for summary judgment on the issue of back pay and denied plaintiff's motion for partial summary judgment.

In its bench ruling on the motions, the district court stated agreement with defendant on the issue of back pay. The court determined that the evidence was not clear that plaintiff was either the only or the strongest applicant for the private sector job. The court concluded that plaintiff was really requesting compensatory damages, which were not available under Title VII. Noting that defendant had obviously been wronged, and that some remedy was in order, the court requested that the respective attorneys attempt to fashion an acceptable remedy. The court suggested a final settlement conference for the purpose of attempting to agree on appropriate remedies.

Attempts at settlement were apparently unsuccessful. Following a two-day trial to the court, the court entered judgment incorporating its oral findings of fact and conclusions of law. The court ordered defendant to implement various training, monitoring, and reporting procedures. The court ordered that

plaintiff be given credit for lost sick and annual leave hours and be paid for 147 hours of leave without pay. Finally, the court entered a judgment in favor of plaintiff for $795.70, and ordered plaintiff to submit a motion and affidavit for attorney fees and a bill of costs.

The only issue before this court on appeal is the district court's ruling, following the motions hearing, that plaintiff was not entitled to back pay. We have jurisdiction pursuant to 28 U.S.C. section 1291, and we affirm.

II.

The remedial purpose of Title VII is to make plaintiffs whole for injuries they received due to unlawful employment discrimination. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). Title VII clearly states the equitable remedies available to plaintiff.

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a change with the Commission.

42 U.S.C. section 2000e-5(g). (Plaintiff does not appeal the district court's determination that the provisions for compensatory

damages allowable in the Civil Rights Act of 1991 cannot be retroactively applied here. See Landgraf v. USI Film Prods., 511 U.S. 244, 247 (1994).) The Supreme Court has held that back pay is equitable in nature, and is an integral component of the Title VII scheme. Albemarle, 422 U.S. at 415-18. While the court's decision whether to award back pay is discretionary, "its judgment is to be guided by sound legal principles," see id. at 416 (quotation omitted), and its "decision must ... be measured against the purposes which inform Title VII," id. at 417.

[G]iven a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination...." Id. at 421. Here, the district court concluded that a back pay award to plaintiff, who was at the time still employed by defendant, for the loss of a private sector job he applied for and did not get, possibly due to a tainted reference, would be in the nature of impermissible compensatory damages. We agree.

In Berry v. Stevinson Chevrolet, 74 F.3d 980, 987-89 (1996), this court reversed an award of compensatory damages to a plaintiff following a finding of retaliation in the form of malicious prosecution. We acknowledged that, while not a direct, retaliatory prosecution like "providing a tainted employment reference," adversely affects a plaintiff's "future employment prospects." Id. at 986. Similar to the situation here, in Berry, the discriminatory acts took place prior to the 1991 amendments to the Civil Rights Act, and the traditional Title VII remedies of restatement and back pay were not available. See id. at 988. In reversing the plaintiff's compensatory damages award, we rejected the district court's rationale based on Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 66 (1992), that the federal court could fashion any available remedy to make a injured plaintiff whole. See Berry, 74 F.3d at 988. The rationale in Berry is applicable here.

The district court awarded plaintiff a panoply of remedies within the Title VII remedial scheme. While recognizing that the available statutory remedies do not compensate plaintiff as fully as he would wish, we agree with the district court that it cannot disguise compensatory damages in the cloak of back pay in order to compensate plaintiff further. Therefore, we determine no clear error or abuse of discretion in the district court's decision to deny back pay "in light of the circumstances peculiar to the case." See Albemarle, 422 U.S. at 424.

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

Entered for the Court

Bobby R. Baldock
Circuit Judge

Appendix 10(1)(i)(ii)

The cases that plaintiff cited stand for the fact that back pay is generally appropriate in Title VII cases; and indeed, if Mr. McCaskill had been denied a promotion, let's say, that he should have been given with the - - with the defendant, with the government, and that was because of discrimination, then he would have been entitled to the back pay that he would have made had he been given a proper promotion with the government. But back pay in no case that I've ever seen or that has been cited here can apply, because he did not get a job with some other company, not the company that he's suing, not the company that's the defendant.

Now, on the other hand, there should be some remedy for a wrong; and if he was wronged, there should be some remedy. The remedy may not be as strong or as financially sufficient as plaintiff would like, but there should be some remedy. And I would ask the attorneys to see if they can get together and come up with a creative solution perhaps by way of a better paying job or a position for Mr. McCaskill within the area where he is. If that is possible, then it should be done.

(Transcript of hearing April 2, 1996, p. 12)